

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

The United States of America, *ex rel.*
Joseph M. Thomas, Bringing this Action
on Behalf of the United States of
America,

Plaintiff,

v.

Duke University,
Duke University Health System, Inc.
William M. Foster, Ph.D., and
Erin N. Potts-Kant,

Defendants.

Civil Action No. 1:17-cv-276-CCE-JLW

**RELATOR’S MOTION FOR PARTIAL SUMMARY JUDGMENT—
IMPUTATION OF POTTS-KANT’S KNOWLEDGE TO DUKE**

Relator Joseph M. Thomas, by counsel, moves for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Civil Rule 56.1, and the Court’s April 27, 2018 Minute Entry. By this Motion, Relator seeks partial summary judgment that Defendant Erin N. Potts-Kant’s knowledge¹ related to her falsifications and/or fabrications of experimental data is imputed to Defendants Duke University and/or Duke University Health Systems, Inc. (collectively, “Duke”) for purposes of this False

¹ As used herein, the term “knowledge” applies to Potts-Kant’s state-of-mind relevant to the analysis under 31 U.S.C. § 3729(b)(1).

Claims Act (“FCA”) action.² In support thereof, Relator states as follows:

1. Potts-Kant was a Duke employee from January 2005 to March 2013.
2. At Duke, Potts-Kant was responsible for conducting flexiVent and multiplex experiments for Defendant W. Michael Foster’s core laboratory. These responsibilities were specifically entrusted to her by Foster.
3. In October 2005, Potts-Kant began to falsify and/or fabricate flexiVent and multiplex results, and did so for nearly all experiments through the remainder of her employment. Potts-Kant’s manipulations made the results better.
4. The falsifications and/or fabrications were designed to benefit Duke and its principal investigators—to help obtain and maintain grant funding, and publish scientific articles.
5. Potts-Kant’s knowledge related to her falsifications and/or fabrications is imputed to Duke under prevailing FCA law, as she was acting within the scope of her employment.
6. In addition, Duke agreed to be fully accountable and responsible for Potts-Kant’s actions as a condition of federal grant funding, a commitment that Duke has reaffirmed through its words and actions since this fraud came to light.

² This motion does not address: (1) the imputation of any other individual’s knowledge to Duke; (2) the supervision (or lack thereof) of Potts-Kant, by individuals and/or Duke as an organization; or (3) whether the FCA “scienter” element has been satisfied on any particular false claim, against any particular Defendant.

7. The full basis for Relator's Motion is set forth in the accompanying memorandum in support and the exhibits attached thereto.

WHEREFORE, Relator respectfully requests that the Court:

- a. Grant his Motion for partial summary judgment that Potts-Kant's knowledge is imputed to Duke for purposes of this FCA action; and
- b. Grant such other and further relief as the Court deems just and proper.

This the 7th Day of August, 2018

Respectfully submitted,

JOSEPH M. THOMAS

/s/ Michael J. Finney

Matthew W. Broughton (admitted *pro hac vice*)

J. Scott Sexton (admitted *pro hac vice*)

Gregory J. Haley (admitted *pro hac vice*)

John R. Thomas, Jr. (admitted *pro hac vice*)

Michael J. Finney (admitted *pro hac vice*)

Daniel R. Sullivan (admitted *pro hac vice*)

Andrew M. Bowman (admitted *pro hac vice*)

GENTRY LOCKE

900 SunTrust Plaza

P.O. Box 40013

Roanoke, Virginia 24022-0013

(540) 983-9300

(540)983-9400 (fax)

broughton@gentrylocke.com

sexton@gentrylocke.com

haley@gentrylocke.com

jthomas@gentrylocke.com

finney@gentrylocke.com

sullivan@gentrylocke.com

bowman@gentrylocke.com

/s/ D.J. O'Brien III

D.J. O'Brien III

N.C. State Bar No. 35481

Daniel F.E. Smith

N.C. State Bar No. 41601

BROOKS, PIERCE, MCLENDON,

HUMPHREY & LEONARD, LLP

2000 Renaissance Plaza

230 North Elm Street

Greensboro, North Carolina, 27401

Tel. (336) 373-8850

Fax (336) 378-1001

dobrien@brookspierce.com

dsmith@brookspierce.com

Attorneys for Relator Joseph M. Thomas

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to counsel of record in this matter.

/s/ D.J. O'Brien III

D.J. O'Brien III